

Service Of Process In The Age Of eCommerce

by Dale C. Campbell

Your client's business is being harmed by an offshore internet company. How can you protect your client if its e-business competitor has no physical address at which you can effectuate personal service? In a decision rendered last week that "tread[s] upon untrodden ground", the Ninth Circuit Court of Appeals held that service may be accomplished through email. "When faced with an international e-business scofflaw playing hide-and-seek with the federal court, email may be the only means of effectuating service of process." (*Rio Properties, Inc. v. Rio International Interlink* (March 20, 2002) U.S. Court of Appeals for the Ninth Circuit, Case Nos. 01-15466 and 01-15784.) But don't get your hopes up. You can't just start emailing the summons and complaint on a whim.

The relevant facts of *Rio Properties, Inc. ("RIO") v. Rio International Interlink ("RII")* are important in order to understand the ruling. RIO owns and operates the Rio All Suite Casino and Resort in Las Vegas. RII is a Costa Rican entity that operates internet sports gambling operations. RII operated an on-line gambling operation at www.betrio.com, doing business only through its website. The offshore business has no known physical address, either in the United States or offshore. RIO sued RII in the United States District Court, District of Nevada, alleging various trademark infringement claims and seeking to enjoin RII from the continued use of the name "Rio". RIO discovered that RII did not have an address in the United States for service of process. The only United States address used by RII was the address for its international internet courier, which was not authorized to accept service on RII's behalf. Nevertheless, RIO delivered a copy of the summons and complaint to the courier, who then apparently forwarded it to an attorney representing RII. The attorney spoke with RIO's counsel to ask for a full and complete copy of the complaint, but specifically stated that he was not authorized to accept service on behalf of RII. RIO searched and was unable to locate any address in Costa Rica for RII.

RIO petitioned the District Court for an emergency motion for alternative service of process under Federal Rules of Civil Procedure 4(h)(2) and 4(f)(3). The District Court ordered service of process on RII via mail to the attorney and the international carrier and through RII's email address. Judgment was ultimately entered against RII and RII appealed. One ground RII raised on appeal was the adequacy of service of the summons and complaint. RII argued that the alternative method of service allowed by Rule 4(f)(3) should be viewed only as a last resort, to be used only when the alternative methods of service under Rule 4(f) have failed. The Ninth Circuit disagreed.

Rule 4(f)(3) provides that service upon an individual or corporation may be affected outside of the United States "by other means not prohibited by international agreement as may be corrected by the Court." RII argued that the alternative means available under Rule 4(f), such as 4(f)(1) that provides for service by means authorized by the Hague Convention; or 4(f)(2) that allows service by means prescribed by the law of the foreign country or pursuant to a letter rogatory, must first be exhausted before service may be authorized under Rule 4(f)(3). The Ninth Circuit disagreed and ruled that court-directed service under Rule 4(f)(3) is just as favored as the other means of service

available under Rule 4(f). The only requirements under Rule 4(f)(3) are that service must be: 1) directed by the court; and 2) not prohibited by international agreement.

The Ninth Circuit expressly approved the District Court's order authorizing service by email. The United States Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond. (*Mullane v. Cent. Hannover Bank and Trust Co.*, 339 U.S.306, 314 (1950).) The Ninth Circuit found there to be no authority allowing service via email but did not "labor long" in reaching its decision approving such service. The fact that RII structured its business such that it could be contacted only via email, and that there was no discoverable address in either the United States or Costa Rica, lead the Court to believe that the service of process by email was not only proper, but in this case was the only method of service most likely to reach RII.

The Court's decision in *Rio v. RII* approves of the use of email as an appropriate method for service of process under limited circumstances. A plaintiff seeking to serve a defendant with no known address now has another tool to effectuate service so long as court approval is first obtained.